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No. 03-358

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents contend that provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), and the Clean Air Act (CAA), 42 U.S.C. 7506(c)(1), require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate whether increased cross-border trucking following the President's decision to lift a moratorium on such operations by Mexico-domiciled commercial carriers (Mexican carriers) could adversely affect air quality. Respondents, however, fail to confront four critical considerations: (a) Congress has vested the President, rather than FMCSA, with responsibility for determining whether to open new United States markets to Mexican carriers; (b) FMCSA has no meaningful ability to mitigate any air quality consequences that may result from the President's decision, in response to the ruling by the international arbitration panel, to lift the moratorium on cross-border operations by Mexican carriers; (c) the NEPA evaluation respondents seek would not assist FMCSA in completing the challenged safety-related rulemaking; and (d) FMCSA has no practicable ability to control, for purposes of the CAA conformity requirement, any air-quality consequences that may result from the President's decision to

open United States markets to Mexican carriers. There is, in truth, no meaningful connection between FMCSA's regulatory authority over motor carrier safety and any air quality effects that might result from the President's decision to allow Mexican carriers to conduct cross-border operations. The court of appeals' decision to set aside FMCSA's safety rules—thereby delaying implementation of the President's decision—has no basis in law and represents an improper interference with the President's powers over foreign affairs and trade.

A. Congress Has Charged The President With Sole Responsibility To Decide Whether To Open United States Markets To Mexican Carriers

1. *Section 350 does not authorize FMCSA to exclude Mexican carriers on environmental grounds.* Respondents do not dispute that Congress has given the President responsibility, as part of his authority over foreign affairs and trade, to determine whether to open United States markets to Mexican carriers. See 49 U.S.C. 13902(c); Gov't Br. 21-23. Respondents contend, however, that Congress gave FMCSA separate authority over the access of Mexico-domiciled trucks to the United States through an appropriations rider, Section 350 of the Department of Transportation (DOT) and Related Agencies Appropriations Act, 2002 (Pub. L. No. 107-87, 115 Stat. 864) (reproduced at Gov't Br. App. 12a-20a). Supporting amici likewise describe Section 350 as a "grant of discretion" (see Cal. Br. 16), and argue that FMCSA exercises "independent control" over the entry of Mexican carriers to United States markets by "fulfilling the congressional preconditions" in Section 350. Defenders of Wildlife Br. 18. Those arguments rest on a mistaken understanding of Section 350's content and purpose.

Respondents acknowledge that Section 350 constitutes a "restriction" on FMCSA's authority to spend appropriated funds. See Resp. Br. 22. Respondents fail to recognize, however, that Section 350 operates in the context of the agency's

pre-existing regulatory powers. Under its enabling legislation, FMCSA has no authority to exclude Mexican carriers, as a class, from United States markets. To the contrary, FMCSA is obligated to register for United States operation any carrier, foreign or domestic, "willing and able" to comply with federal motor carrier safety rules. See 49 U.S.C. 13902(a). Only the President or his delegate may exclude Mexican carriers based on their nationality or Mexican domicile. See 49 U.S.C. 13902(c). The President has not delegated that trade authority to FMCSA or any other agency.

Consistent with the legislative limitations on its powers, FMCSA has not claimed any power to determine whether or under what conditions Mexican carriers should be allowed to operate in the United States. Rather, FMCSA initiated the rulemaking at issue in this case to fulfill the agency's statutory responsibility to register Mexican carriers that the President has determined should be allowed to operate in the United States. The rulemaking established procedures respecting motor carrier safety (specifically, application and monitoring requirements) for the agency to use in fulfilling that statutory obligation. As respondents now concede (Resp. Br. 32 n.11), FMCSA's rulemaking did not cause the President to make the decision—pursuant to his authority under 49 U.S.C. 13902(c)—to comply with the North American Free Trade Agreement (NAFTA) and open United States markets to Mexican carriers.

Respondents incorrectly insist that FMCSA is responsible for the environmental effects of the President's decision solely on the basis of Section 350. To be sure, Section 350 prohibited FMCSA from implementing the President's trade decision until that agency incorporated specific safety-related measures into its application and monitoring procedures for Mexican carriers. As a result, those carriers would not enter the United States, and no corresponding environmental consequences of their entry would result, until FMCSA completed its rulemaking. But Congress did not thereby give FMCSA "separate control over *whether* [cross-

border trucking by Mexican carriers] could occur." Resp. Br. 32 (emphasis added).

Congress has directed FMCSA to register any and all "willing and able" Mexican-carrier applicants that are made eligible, by Presidential decision, to operate in the United States. See 49 U.S.C. 13902(a). Section 350 does not empower FMCSA to veto the President's decision by withholding the issuance of registration requirements with which Mexican carriers must comply. Rather, Section 350 makes FMCSA responsible for imposing specific application and monitoring requirements—which Congress itself deemed necessary to ensure the safe operation of Mexican carriers in the United States—as part of FMCSA's statutory obligation to implement the President's decision.

Importantly, Section 350 does not empower FMCSA to place new conditions on the entry of Mexican carriers beyond the fundamental condition, imposed by Congress, that every carrier, foreign or domestic, seeking U.S. operating authority prove its willingness and ability to comply with motor carrier safety rules.[1] See 49 U.S.C. 13902(a). Section 350 simply mandates certain procedures governing the exercise of FMCSA's authority in applying this standard. Before the enactment of Section 350, FMCSA had broader discretion to determine the requirements that Mexican carriers

[1] In addition to the preconditions related to FMCSA's rulemaking, see generally Pub. L. No. 107-87, § 350(a), 115 Stat. 864, Congress also provided that FMCSA could not process applications by Mexican carriers until the DOT Inspector General conducted a review of border operations and the Secretary of Transportation certified to Congress, based on that border review, that "opening of the border does not pose an unacceptable safety risk to the American public." See § 350(c)(2), 115 Stat. 868. While those provisions authorized DOT to prevent the entry of Mexican carriers upon a determination that an "opening of the border" would present "unacceptable safety risks," DOT certified to Congress that there would be no unacceptable safety risk. Respondents do not challenge that certification. Thus, contrary to amici's suggestion (Cal. Br. 16 & n.3), the additional safety-related duties in Section 350 do not give FMCSA the authority "not * * * to act at all" with respect to registration of Mexican carriers.

would need to fulfill to prove their willingness and ability to comply with United States motor carrier safety rules. Under Section 350, FMCSA must adopt the procedures that Congress has dictated for Mexican carriers. See generally Pub. L. No. 107-87, § 350(a), 115 Stat. 864. While Congress left FMCSA with a narrow range of discretion in fashioning the final registration procedures, Congress did not empower FMCSA to change the fundamental condition for entry. Consequently, and contrary to amici's assertion (South Coast Air Quality Management District (SCAQMD) Br. 12), it is the actions of Congress and the President, not FMCSA's rulemaking, that will "shape" the characteristics of the Mexican truck fleet that will operate in the United States.

Because Section 350 does not augment FMCSA's regulatory authority, there is no basis for respondents' claim (Resp. Br. 23) that Section 350 made the entry of Mexican carriers contingent on further environmental review. Of course, FMCSA's rulemaking was subject to NEPA compliance obligations to the same extent that all final agency actions not categorically excluded (see generally 40 C.F.R. 1501.4) are subject to those obligations. But the specific issue here is whether an Environmental Assessment (EA), which FMCSA began before enactment of Section 350, was (and remained) sufficient to satisfy FMCSA's NEPA obligation.[2] Because Section 350 did not enlarge the scope of FMCSA's authority or the reach of its rulemaking, FMCSA reasonably determined that Congress did not intend any additional environmental analysis. If Congress had intended to require further analysis, Congress could have easily written that requirement into Section 350. But Congress took no such action. Section 350 required FMCSA (and DOT) to complete numerous specific tasks with respect to motor

[2] FMCSA initially determined that an EA was not necessary for the proposed rules, see 66 Fed. Reg. 22,377 (2001) and 66 Fed. Reg. 22,418 (2001), but the agency changed its position before Congress enacted Section 350. See J.A. 57. Contrary to respondent's suggestion (Resp. Br. 6-8), FMCSA did not prepare an EA in response to that legislation.

carrier safety, but Section 350 did not once mention NEPA, FMCSA's ongoing NEPA review, the CAA, or environmental concerns relating to vehicle emissions.[3]

2. *Congress did not ratify the court of appeals' ruling.* There is also no merit to respondents' argument (Resp. Br. 26-30) that Congress manifested an intent to require further environmental review by reenacting Section 350 after the court of appeals' ruling. The legislation extending the terms of Section 350 to DOT's 2004 appropriation, see Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 298, was accompanied by committee reports noting that the Ninth Circuit had set aside the rules mandated in Section 350. See S. Rep. No. 146, 108th Cong. 1st Sess. 69-70 (2003); H.R. Rep. No. 243, 108th Cong., 1st Sess. 81 (2003). But Congress did not change the terms of Section 350 in the 2004 legislation or the earlier "reenactment" of Section 350 for fiscal year 2003, see Pub. L. No. 108-199, Div. F, Tit. I, § 130, 118 Stat. 298 and Pub. L. No. 108-7, Div. I, Tit. III, § 348, 117 Stat. 419. The Senate and House reports express no opinion on the merits of the Ninth Circuit's ruling. Consequently, the apparent intent of Congress was simply to retain the safety requirements dictated by Section 350, while FMCSA's rulemaking (and thus the

[3] While Section 350 requires FMCSA to ensure Mexican-carrier preparedness "to comply with * * * Hazardous Materials rules and regulations," see Pub. L. No. 107-87, § 350(a)(1)(B)(v), 115 Stat. 864, the reference to those rules, which are within DOT's own substantive safety jurisdiction, does not support amici's suggestion (Defenders of Wildlife Br. 20) that FMCSA had—or was given in Section 350—authority over environmental issues concerning Mexican trucks generally or the particular air-quality issues in this case. In proceedings below, respondents never argued, and the court of appeals never found, that FMCSA failed adequately to consider hazardous-materials issues. Amici's attempts now to assert unfounded hazardous-materials claims (*id.* at 22), as well as unfounded claims about truck safety and drug trafficking (Eagle Forum Education & Legal Defense Fund Br. 14-21), are inappropriate and without merit.

final content of the rules) remained unfinished and this litigation ran its course.

Moreover, even if Congress's reenactment of Section 350 could somehow be viewed as an endorsement of the court of appeals' ruling, that supposed endorsement is entitled to no weight. In determining that FMCSA was obligated, before promulgating the challenged rules, to prepare an EIS and a CAA conformity analysis of the effects of the President's decision to open U.S. markets to cross-border trucking, the court of appeals relied on its finding that the President's decision was "reasonably foreseeable" and its determination (in the context of its decision on standing) that Section 350 provided bare "but for" causation between promulgation of the rules and implementation of the President's decision. See Pet. App. 30a-31a, 47a, 19a-23a. The court of appeals did not determine—as respondents and their amici now erroneously contend (Resp. Br. 32; see Cal. Br. 16)—that Section 350 gave FMCSA discretion to determine whether Mexican carriers may engage in cross-border trucking or that Section 350 itself required FMCSA to engage in further environmental analysis.[4]

Respondents' reliance on the "ratification doctrine" (Resp. Br. 26) is accordingly misplaced. When called upon to discern the meaning of statutory language that Congress has reenacted in the wake of "consistent judicial construction," the Court may presume that Congress intended to adopt that construction. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994); see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). But in this case, the statutory language that Congress re-

[4] As explained in the government's opening brief (Gov't Br. 30-40, 45-47), the court of appeals' failure to address FMCSA's lack of discretionary control over the environmental effects at issue constitutes the fundamental error in the court's analysis. By ignoring that issue, the court of appeals effectively treated the agency's lack of discretion as irrelevant for NEPA and CAA purposes. Respondents make no effort to defend that position, which is clearly contrary to established law. See *id.* at 39.

enacted—Section 350—played no relevant part in the court of appeals' analysis of FMCSA's substantive obligations. Rather, the court of appeals reasoned that NEPA and the CAA themselves obligated FMCSA to conduct additional environmental analysis. Thus, even if the legislative reports could be construed as endorsing the Ninth Circuit's ruling (which they did not), those reports could be viewed as endorsing only a suspect interpretation of *other* pre-existing legislation—NEPA and the CAA—that was not then before Congress. See *Central Bank of Denver*, 511 U.S. at 185 ("[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.").

B. FMCSA Does Not Have Any Meaningful Ability To Mitigate Air-Quality Impacts That May Result From The President's Trade Decision

1. *Respondents' mitigation arguments are untimely.* Respondents contend, as an alternative to the assertion that FMCSA has a discretionary role in causing the opening of United States markets to Mexican carriers and the attendant environmental effects, that FMCSA is responsible for the environmental effects of the President's trade-liberalization decision because the agency can "mitigate" those effects through its rulemaking. See Resp. Br. 38-42; see also Defenders of Wildlife Br. 20-22; Cal. Br. 17-19. According to respondents, FMCSA could have chosen alternatives to the challenged rules that would offset increases in the air pollution that respondents allege will result from the President's decision, and FMCSA is therefore responsible under NEPA for analyzing, and under the CAA for evaluating and controlling, all the effects of the President's decision. That claim, however, is unsound at the threshold because it was not raised in a timely manner and therefore is not properly before the Court.

As explained in the government's opening brief (Gov't Br. 27-29), respondents did not urge, either in their comments submitted during administrative proceedings before FMCSA or in their initial court of appeals' brief, that FMCSA should adopt or study rulemaking alternatives beyond those evaluated in FMCSA's EA. Respondents now insist (Resp. Br. 40)—without even now identifying any particular alternatives—that because FMCSA "could * * * enact[] more restrictive safety measures that would also mitigate the environmental effects of [Mexican] trucks operating throughout the United States," an EIS is necessary to study such unidentified alternatives. *Ibid.*; see Cal. Br. 27-28; Defenders of Wildlife Br. 10. Respondents' belated claim warrants no consideration by this Court. Because respondents failed to raise that claim when FMCSA was considering its rules, FMCSA was not given the opportunity to explain, as part of the administrative record, that there are no such alternatives reasonably available to FMCSA.

It is "black-letter administrative law" that, absent special circumstances, courts will not consider objections to an agency's actions that were not raised during administrative proceedings. *Appalachian Power Co.* v. *EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001). Indeed, in the specific context of NEPA, this Court has made clear that persons challenging agency compliance with NEPA have a responsibility, during administrative proceedings, to "structure their participation so that it * * * alerts the agency to the [parties'] position and contention," to allow the agency to give the issue meaningful consideration. *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978). Respondents give no explanation for their failure to urge different alternatives during administrative proceedings. Rather, after failing to give FMCSA a reasonable opportunity to respond to their claim—either during administrative proceedings or even in the initial briefing below—respondents now erroneously assert to this Court that FMCSA "do[es] not dispute" the availability of reasonable "mitiga-

tion" alternatives. Resp. Br. 40 n.17. As explained below, FMCSA does dispute that claim. But the Court should reject that claim outright because respondents never gave FMCSA a reasonable opportunity to address it during administrative proceedings.[5]

2. *Respondents' mitigation argument is without merit.* If the Court reaches respondents' claim that FMCSA could impose additional measures to mitigate emissions from Mexican carriers, the Court should reject it. Respondents overlook the critical fact that FMCSA is responsible for administering and enforcing motor carrier *safety* rules, and not for regulating vehicle emissions that might impair air quality. See, *e.g.*, J.A. 51-52 (describing the scope of FMCSA's regulatory authority). FMCSA's elaborate and detailed regulations, which focus on the safe design and operation of commercial motor vehicles, do not include environmental standards for vehicle emissions. See generally 49 C.F.R. Pts. 350-399.[6]

Congress has mandated, through the CAA's "mobile-source" program (42 U.S.C. 7521 *et seq.*), manufacturing standards for vehicles and vehicle engines sold within or imported into the United States, to control emissions from these sources. See 42 U.S.C. 7522(a)(1); see also 40 C.F.R. Pt. 86 (emissions standards). However, EPA—and not FMCSA—enforces those standards. Further, the CAA con-

[5] Respondents have essentially no answer to this waiver argument. The only authority they cite for the proposition that they may urge other alternative safety rules before a reviewing court, even though they did not make that argument before FMCSA, is an appellate decision that predated this Court's decision in *Vermont Yankee*. See Resp. Br. 40 n.17.

[6] Amici argue that FMCSA regulates vehicle "exhaust" (Defenders of Wildlife Br. 20), but the cited regulation—49 C.F.R. 393.83—actually regulates exhaust *systems* for safety purposes; i.e., to ensure that engine exhaust is not vented in a location that could cause fire or otherwise harm vehicle passengers. The fact that FMCSA can and must require Mexican carriers, as well as all domestic carriers, to comply with that equipment-safety standard does not demonstrate that FMCSA has authority to regulate the constituents of vehicle exhaust for air-quality purposes.

tains no specific restrictions on foreign-domiciled carriers (either Mexican or Canadian) that transport goods between their home countries and the United States in trucks purchased and maintained outside the United States. And respondents do not contend that the CAA's general mobile-source standards, as implemented by EPA, apply to such trucks. To the contrary, respondents' principal claim of environmental harm—that the opening of new United States markets to cross-border operations by Mexican carriers will increase domestic air pollution—is predicated on the notion that Mexican carriers will operate trucks that were not (and will not be) manufactured to United States emission standards. See, *e.g.*, Resp. Br. 10; SCAQMD Br. 16-19; American Public Health Association (APHA) Br. 17; Defenders of Wildlife Br. 4; Cal. Br. 3.[7]

Absent any basis for concluding that FMCSA can regulate vehicle emissions, respondents are left to argue that FMCSA can control emissions from Mexican carriers indirectly: (a) by making the safety-registration process "more onerous"; or (b) by removing older more polluting trucks through more effective enforcement of motor-carrier safety standards. See Resp. Br. 9, 40. Those arguments are unsound. The former claim is predicated largely on FMCSA's statement in the EA for the challenged rules (J.A. 66-67) that, when compared to taking no action (i.e., registering Mexican carriers under pre-existing rules), imposing heightened procedural requirements on Mexican carriers could "deter" some applicants and thereby incrementally reduce the number of Mexican trucks that will operate in the United States. In making this observation, FMCSA did not state that the deterrent effect would be significant for air-quality purposes, or that there were additional application and monitoring requirements that

[7] For this reason, respondents' claim (Resp. Br. 41) that FMCSA can address emissions from Mexican carriers by "engag[ing] in cooperative agreements with other agencies, such as * * * the [EPA], to include emissions inspections with [FMCSA's] safety inspections," is internally inconsistent.

FMCSA could reasonably impose on Mexican carriers above and beyond the already heightened requirements in the proposed rules. Because FMCSA cannot exclude Mexican carriers that are willing and able to meet federal motor carrier safety rules, see 49 U.S.C. 13902(a), the agency cannot make its registration rules more stringent than necessary to achieve that safety objective. Significantly, respondents do not contend that additional restrictions are necessary for purposes of motor-carrier safety.

Respondents also fail to show that there is any meaningful correlation, much less an "extremely close connection" (see Resp. Br. 34), between enforcement of motor carrier safety rules and mitigation of the alleged environmental harms in this case. In suggesting that connection (*id.* at 40; see Defenders of Wildlife Br. 22), respondents rely on FMCSA's statement—in its court of appeals brief (J.A. 484)—that the heightened procedural requirements in the challenged rules would "tend to restrict" the number of older trucks used by Mexican carriers in cross-border operations. FMCSA based that statement on the commonsense notion that older trucks may be more likely than newer trucks to have equipment-safety problems. FMCSA did not determine, nor have respondents otherwise shown, that most older Mexican trucks have equipment-safety problems or that stricter enforcement of equipment-safety rules (which would apply in any event) would significantly alter the age distribution (and emissions profile) of trucks in the Mexican cross-border fleet.[8] The emissions profile would change only if safety

[8] Because Mexico did not mandate emission standards for truck engines sold in Mexico until 1993 (J.A. 356), several years after the United States adopted such standards, trucks sold in Mexico prior to 1993 might emit more pollutants than their United States counterparts. Some older Mexican trucks, however, may have been originally sold in the United States to United States carriers and, thus, have been manufactured to United States pollution control standards. Between 1993 and 2003, Mexico and the United States subjected truck engines sold within their respective borders to the same standards. *Ibid.* The United States since has adopted new and more stringent standards to go into effect between 2004 and 2007, which Mexico has not yet adopted. See *ibid.*; J.A. 484-485.

enforcement caused a significant reduction in the use of older trucks, as opposed to simply compelling improved maintenance of such trucks. Moreover, respondents do not dispute FMCSA's finding, in its EA, that increased safety enforcement can have a negative impact on emissions control. J.A. 164-165. In particular, more frequent roadside inspections of Mexican carriers for safety purposes will increase engine-operation time and, to that extent, increase emissions in the United States. *Ibid.*

Ultimately, there is no reason to believe that more stringent registration rules would both be appropriate in the context of FMCSA's statutory duty to register all willing-and-able applicants and significantly affect the claimed air-quality consequences from the Mexican carriers' operations. For example, amici cite potential air-quality impacts of cross-border trucking in future years in southern California and other border areas, but they attribute those impacts largely to the fact that Mexican carriers might not be subject to California's low-sulphur fuel requirement or progressively tighter United States emissions standards that go into effect between 2004 and 2007. See SCAQMD Br. 17-19; Cal. Br. 3; APHA Br. 17-19, 23; see also J.A. 379-380. Respondents do not contend that tighter enforcement of motor-carrier safety standards—through additional (and as-of-yet unidentified) application or inspection registration requirements—could meaningfully address those specific air-quality impacts.

C. Preparation Of An Environmental Impact Statement Evaluating The Effects Of Cross-Border Trucking Would Not Assist FMCSA In Its Rulemaking

Congress enacted NEPA to improve agency decisionmaking by "inject[ing] environmental considerations into the federal agency's decisionmaking process." *Weinberger* v. *Catholic Action of Haw.*, 454 U.S. 139, 143 (1981); see *Rob-*

ertson v. *Methow Valley Citizens Council*, 490 U.S. 343, 349 (1989). The court of appeals' order requiring FMCSA to prepare an EIS evaluating the effects of cross-border trucking would not enhance FMCSA's rulemaking because, as the government explained in its opening brief (Gov't Br. 35-36), FMCSA has no role to play in that trade-policy decision, which rests with Congress and the President.[9]

The government has already addressed the flaws in respondents' untimely—and waived—claim that an EIS is necessary to help FMCSA develop alternatives to the challenged rules. See pp. 10-13, *supra*. Faced with the absence of any basis to argue that an EIS would provide information meaningful to FMCSA's rulemaking, respondents and the amici are left to argue that an EIS should be required because its preparation would not be impossible, see Cal. Br. 24, and because an EIS might provide useful information for Congress and government agencies other than FMCSA, Resp. Br. 42-43; SCAQMD Br. 17; Cal. Br. 26-27; Defenders of Wildlife Br. 23-25. Those arguments are without merit.

First, this Court's holding that an agency is excused from NEPA compliance where a statutory conflict renders compliance impossible, see *Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776, 787-790 (1976); see also 40 C.F.R. 1500.6 (same), does not mean that federal agencies are otherwise obligated to prepare an EIS whenever possible. The threshold question is always whether the agency's proposed action will "significantly affect" the environment. 42 U.S.C. 4332(2)(C). As the government explained in its opening brief (Gov't Br. 39), the courts of appeals have uniformly held that, where an agency does not have discretionary control over actions that may cause adverse effects, the effects cannot be deemed the result of *agency* action for NEPA purposes. See, *e.g.*, *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (stating that "[t]he touchstone of whether NEPA applies is discretion"). Contrary to respondents' assertion (Resp. Br. 41), this is a case in which FMCSA clearly lacks "significant discretion over the challenged action"—*viz.*, the President's decision to allow cross-border trucking.

Second, while this Court has observed that NEPA was designed to serve a "larger informational role," see *Robertson*, 490 U.S. at 349, the Court explained that the core purpose of providing information to the public and other interested agencies is to allow the "larger audience [to] play a role in * * * the [agency's] decisionmaking process." *Ibid.* This Court has never held—nor do respondents cite any case holding—that an agency must prepare an EIS where there is no reasonable expectation that the EIS will influence, or will be material to, the agency's decisionmaking. Contrary to respondents' assertion (Resp. Br. 36), this case does not present the common situation in which a federal agency has partial control, along with state or private actors not subject to NEPA, over an action that will have environmental effects. Rather, this case presents a situation in which the relevant federal agency has no meaningful control over the activity in question. The actors with control over the opening of United States markets to cross-border trucking by

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[9] FMCSA fully evaluated the air-quality and other environmental impacts of its own rulemaking—as distinguished from the President's action—and made a finding of no significant impact (FONSI). Contrary to the assertion of amici (SCAQMD Br. 15-16), the adequacy of FMCSA's EA and FONSI in that respect is not before this Court. Although the court of appeals stated that the EA suffered from various methodological flaws, including errors in emissions modeling (Pet. App. 37a-39a), the court made those statements in the context of its overriding determination (*id.* at 30a-31a) that FMCSA was responsible for evaluating all emissions attributable to the President's action in lifting the moratorium and opening the border. Significantly, the court never addressed FMCSA's argument (J.A. 487-488) that the professed methodological flaws were not defects when viewed in the context of FMCSA's limited obligation to analyze the emissions effects of its rulemaking. Nor did respondents challenge that argument in their briefs below. Thus, the question before this Court is simply whether FMCSA acted arbitrarily and capriciously in limiting the scope of its EA to matters within the scope of its own discretion in conducting the rulemaking.

Mexican carriers—the Congress and the President—are expressly exempt from NEPA. See 40 C.F.R. 1508.12.

The court of appeals' decision has not improved FMCSA's own decisionmaking process on the narrow vehicle safety issues before it. Instead, the court's decision has interfered with a joint congressional-executive judgment respecting an important and sensitive matter of foreign relations and trade policy. If allowed to stand, the court's decision would not inject any relevant environmental consideration into the agency's designated decisionmaking role. Rather, it would inject needless confusion, expense, and delay.

D. FMCSA Was Not Required To Conduct A Conformity Review Under The Clean Air Act

Respondents incorrectly assert that the CAA requires this Court to determine, under 42 U.S.C. 7506(c)(1), whether FMCSA's rulemaking can be seen to "support in any way" an activity (the opening of United States markets to cross-border trucking by Mexican carriers) that respondents contend "does not conform" to an applicable state implementation plan (SIP). See Resp. Br. 47; see also Cal. Br. 15. As the government has explained (Gov't Br. 45-47), EPA has issued regulations that define, for federal agencies, what it means to "support" an activity for purposes of the conformity requirement. See 40 C.F.R. 93.150-93.160; see also *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,214 (1993). Those regulations, which respondents do not challenge and which have been upheld by the D.C. Circuit, are entitled to deference. See *Environmental Defense Fund, Inc.* v. *EPA*, 82 F.3d 451, 464 (per curiam), amended, 92 F.3d 1209 (1996). The relevant question, accordingly, is whether FMCSA's decision not to perform a conformity analysis reflects a proper understanding of EPA's conformity regulations.

FMCSA's decision is firmly supported by EPA's regulations. The regulations state that an agency is not responsible for indirect emissions that are caused by the agency's actions if the emissions are beyond the agency's "practicable control" and "program responsibility." 40 C.F.R. 93.152 (definition of "indirect effects"). Under that test, emissions from Mexican carriers operating in the United States as a result of the President's trade decision can be attributed to FMCSA's rulemaking only if FMCSA can practicably control those emissions through its ongoing authority over motor carrier safety. As already demonstrated (p. 2-6, *supra*), FMCSA can exercise no such control. Contrary to the claims of respondents and amici (Resp. Br. 47; Defenders of Wildlife Br. 28), FMCSA's ongoing control over Mexican-carrier safety (through registration, inspections, and audits) does not equate to control over vehicle emissions.[10]

Respondents' reliance (Resp. Br. 48) on EPA's definition of "continuing program responsibility" is equally misplaced. The definition states in full:

> *Emissions that a Federal agency has a continuing program responsibility for* means emissions that are specifically caused by an agency carrying out its authorities, and does not include emissions that occur due to subsequent activities, unless such activities are required by the Federal agency. When an agency, in performing its normal program responsibilities, takes actions itself or imposes conditions that result in air pollutant emissions by a non-Federal entity taking subsequent actions, such emissions are covered by the meaning of a continuing program responsibility.

[10] In contrast, FMCSA does exercise continuing program control over emissions resulting from the increased safety inspections called for in the challenged rules. As explained in the government's opening brief (Gov't Br. 14), FMCSA determined that emissions attributable to increased safety inspections will be below the regulatory thresholds that trigger the obligation to perform a conformity analysis. See Pet. App. 65a-66a, 155a. Respondents do not challenge that determination. Likewise, in asserting that emissions will exceed relevant regulatory thresholds (APHA Br. 23; SCAQMD Br. 20), amici focus on emissions from cross-border trucking and not emissions from motor-carrier safety inspections.

40 C.F.R. 93.152. Quoting only the second sentence of this definition, respondents assert that FMCSA is responsible for emissions by Mexican carriers that are eligible to operate in the United States as a result of the President's decision, because the promulgation of the safety regulations is part of FMCSA's "normal program responsibilities" and will "result in air pollution emissions by a non-Federal entity taking subsequent actions" (i.e., Mexican-domiciled trucks crossing the border and emitting pollution). Resp. Br. 48.

The regulation respondents quote, read as a whole, in fact refutes their position. Looking to the first sentence of the regulation, any emissions by Mexican trucks in the United States are not "specifically caused" by FMCSA. FMCSA itself does not take any action (except for roadside inspections) that "cause" such emissions in the "specific" sense necessary to place them within FMCSA's continuing program responsibility, and any "activities" by the carrier that occur "subsequent" to registration—i.e., any actual entry of the carrier's trucks into the United States, the selection of routes they travel, and any emissions that occur—are not "required" by FMCSA. Looking to the second sentence, which is an elaboration of the first, FMCSA does not "take actions itself" (again, except for roadside inspections) that result in air pollutant emissions, because FMCSA's issuance of regulations and approval of applications do not themselves result in pollution. Nor does FMCSA "impose[] conditions" (i.e., requirements) on the subsequent operations of Mexican carriers that result in such emissions; the conditions FMCSA imposes are directed to safety issues. See *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,214, 63,221 (1993) ("The EPA does not believe that Congress intended to extend the prohibitions and responsibilities to cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity, either because there is no continuing program responsibility or

ability to practicably control."); *ibid.* (federal agency has no responsibility to attempt to limit emissions that are outside its "legal control" or to "leverage" its own legal authority to influence or control nonfederal activities that it cannot practicably control, are not subject to continuing program responsibility, or that lie outside the agency's own legal authority); see generally *id.* at 63,219-63,224.

The amici States posit (Cal. Br. 19-21) that FMCSA could obtain emissions reductions from other sources to offset any emissions increases resulting from the President's decision to open United States markets to cross-border trucking by Mexican carriers. Because the President is not subject to the conformity requirement (see Gov't Br. 47-48)—a matter that respondents do not dispute—FMCSA cannot be compelled to make the President's action conform. And FMCSA itself has no continuing responsibility for emissions by Mexican trucks that could trigger any occasion for FMCSA to try to obtain emission offsets. Tellingly, moreover, amici identify nothing that FMCSA could do within its regulatory authority to obtain emissions offsets. Rather, amici argue (Cal. Br. 20-21) that FMCSA could go to Congress for relief, apparently for funds to purchase emissions reductions (pollution credits) from "private sources" or for the authority to barter for emissions reductions from other federal agencies or programs. Nothing in the CAA required FMCSA to go to such extraordinary lengths before fulfilling its statutory duties over the limited subject of truck safety.

At bottom, respondents and their amici would transfer control over important foreign policy and trade issues from Congress and the President to individual agencies and the courts. Congress and the President have determined that the United States should open United States markets to cross-border trucking by Mexican carriers. If that decision has any significant effect on United States air quality, the principal reason will be the different emission characteristics of United States trucks and Mexican trucks used in cross-border transportation. See J.A. 379-380, 388; see also Defen-

ders of Wildlife Br. 4; APHA Br. 18-19). FMCSA's regulations addressing vehicle safety issues can prevent vehicle accidents that might arise from allowing Mexican carriers to engage in cross-border trucking, but they cannot resolve the environmental issues that may arise from that trade policy decision.

As respondents acknowledge, Congress has authority, not affected by NAFTA, to require foreign carriers to meet United States environmental standards as a condition of entry into United States markets. Resp. Br. 22. If, in accord with the arguments of respondents' and their amici, Congress has not required foreign cross-border carriers to operate trucks manufactured to United States emissions standards (or their equivalent) as a condition of entry to United States markets, respondents' remedy rests with Congress, and not in setting aside motor-carrier safety procedures with which respondents have no identified substantive quarrel.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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